

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KEVIN NATHANIEL OSBORN,

Appellant.

No. 33410-1-II

UNPUBLISHED OPINION

VAN DEREN, A.C.J. — Kevin Nathaniel Osborn claims that he was denied effective assistance of counsel because his trial counsel failed to argue at sentencing that his convictions for possession of stolen property in the first degree and taking a motor vehicle in the second degree are the same criminal conduct. He also appeals the trial court’s calculation of his offender score as 19 following convictions for first degree possession of stolen property (PSP), second degree taking a motor vehicle without permission (TMVWOP), attempting to elude pursuing police vehicle, and possession of methamphetamine. In a statement of additional grounds for review (SAG), he raises five additional evidentiary issues relating to testimony about: (1) exhibits, (2) drug kits, (3) K-9 tracking, (4) fingerprints, and (5) an officer’s identification of him. He also claims cumulative error. Holding that the trial court committed no prejudicial error, we affirm.

FACTS

At about 1 a.m. on March 23, 2005, Lelund Shaw was watching television with his brother and girl friend when he heard a loud truck start just outside his apartment. Because his truck had a loud, recognizable engine, Shaw and his brother investigated and found Shaw's truck gone. Shaw had not given anyone permission to take his truck, so he called the police to report it stolen.

Longview Police Officer Jason Ferriss responded to Shaw's call shortly after 1 a.m. and recorded information Shaw gave him regarding the truck, including its description and license plate number. At about 3:15 a.m., Ferriss spotted Shaw's truck, pulled behind it, and activated his emergency lights. When Ferriss activated his emergency lights, the truck accelerated rapidly and reached a speed of about 65 m.p.h. in a 30 m.p.h. zone. A high-speed chase ensued through a residential area where the truck failed to stop for a red light and stop sign. The truck eventually pulled into a driveway, then backed out of the driveway so that the truck was facing Ferriss, and proceeded to weave backward down the street away from Ferriss at about 35 m.p.h., barely maneuvering around a second patrol car that had approached from the opposite direction.

When the truck backed out of the driveway, there was a moment when Ferriss and the driver faced each other from about 10 feet away. Ferriss saw that the driver had a shaved head, was "kind of scruffy," and was wearing a black coat. Report of Proceedings (RP) (May 25, 2005) at 65.

Ferriss continued pursuing the truck past the second patrol car as the truck continued backward, hitting and "jump[ing] up on" and off a guardrail before spinning around 180 degrees to continue driving forward at "fifty-plus" m.p.h. RP (May 25, 2005) at 129-30. Two patrol cars

continued the pursuit through another residential area at speeds between 60 and 70 m.p.h. with the truck running red lights and stop signs. The truck turned sharply down an alley, gained some separation from the pursuing patrol cars, and drove for several blocks before it turned back onto a boulevard where the patrol cars temporarily lost sight of it.

Shortly thereafter, police discovered the truck, still running, but unoccupied, in a nearby alley. A K-9 unit arrived within minutes and Officer Michael Watts and Officer Alan Buchholz began tracking from the truck with Bruno, the K-9 officer. Watts received a call requesting that he respond to a yard several houses from where the officers were located. Buchholz and Watts separated for a short time, but met and continued tracking. While Watts and Buchholz were separated, Bruno paused for a moment in a yard as if he expected to discover the person leaving the tracked scent.

As the officers and Bruno continued tracking southbound, a man on a bicycle appeared and rode quickly away from them down the alley. Watts radioed other officers in the area regarding the bicycle rider and Buchholz called off the K-9 search at the end of the alley once he “found out something that caused [him] to end [the search.]” RP (May 26, 2005) at 39-40.

Officer Mark Langlois spotted the bicycle rider going “[a]bout as fast as [he] possibly could be” down another nearby alley. RP (May 26, 2005) at 8. Langlois pulled his vehicle next to the cyclist, who stopped. He took the cyclist into custody. Ferriss identified the cyclist as the same person who he had seen driving the truck. The bike rider was Osborn.

Osborn agreed to speak to officers after acknowledging that he understood his *Miranda*¹ rights. He denied driving the truck and stated that he had borrowed the bike with permission

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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from two friends, Lou Anne Cass and Ross Little, at about 1:30 a.m. Cass testified, however,

that Osborn had been at her apartment earlier that night but had left before midnight without borrowing a bicycle. Further, Cass testified that Ross Little's bicycle was parked at her apartment and that it was there when police arrived at her apartment that morning.

During booking, a corrections officer searched Osborn and discovered a baggie of crystalline powder, later identified as methamphetamine.

The State charged Osborn with PSP, TMVWOP, attempting to elude pursuing police vehicle, and possession of methamphetamine.

At trial, the State presented numerous physical and photographic exhibits. Exhibits 1, 2, and 3 were photographs of damage the truck incurred during the chase. Shaw testified that the photos were a fair and accurate depiction of the truck shortly after police recovered it. Osborn's trial counsel objected to foundation and chain of custody of the exhibits.

Exhibits 6 through 11 were physical items police obtained from the truck: two flashlights, two pair of pliers, and two screwdrivers. Watts testified that he collected the items from the truck and that each item was in the same or substantially the same condition as when he removed them from the truck. Watts further identified his initials on the sealed evidence bag that contained all of the items. Osborn's trial counsel objected to foundation and chain of custody of these exhibits as well.

Exhibit 36 was a photograph of a Ford owner's manual police found inside a bag in Shaw's Dodge truck. Exhibits 45, 46, and 47 were a bag, fanny pack, and stocking cap found in the truck. Officer Danielle Jenkins testified that exhibit 36 was a fair and accurate depiction of the owner's manual when it was found in the truck. Similarly, Jenkins testified that the bag,

fanny pack, and stocking cap were in the same condition as when they were collected from the truck. Moreover, Jenkins also identified her initials on the sealed evidence bag containing exhibits 45, 46, and 47. Osborn's trial counsel objected to the owner's manual on the basis of relevance and prejudice. Osborn's trial counsel objected to the bag, fanny pack, and stocking cap on the basis of relevance. The trial court overruled all of Osborn's counsel's objections to the exhibits.

Before trial, the court granted Osborn's motion in limine to prevent officers from testifying about a "drug kit" found in the truck containing small plastic bags, syringes, and spoons. Watts violated the court's order when he testified that he found a "drug kit-type thing" in the truck. RP (May 25, 2005) at 140. Osborn's trial counsel immediately moved for a mistrial, arguing that the testimony was in violation of the court's order and that, although inadvertent, the testimony invaded the province of the jury. The trial court denied the motion, stating that although inappropriate, the statement was not overly prejudicial and was not "something that the jury could not set aside, or that it goes to character of - of this Defendant." RP (May 25, 2005) at 143.

Also during trial, Jenkins testified that she lifted fingerprints from the truck's grill area, that she sent them to the Washington State Patrol crime lab for identification purposes, but that she had not received results from that testing by the time of trial. On cross-examination, Jenkins testified that she did not know whose fingerprints were on the truck and that she unsuccessfully attempted to lift other prints from the truck's window, but that she did not attempt to lift prints from the steering wheel or gearshift.

The jury convicted Osborn on all four counts. Based on his offender score of 19, the trial court sentenced him within the standard range to 54 months' confinement and ran that sentence

concurrently with sentences at the high end of the standard range for the remaining counts. The standard ranges were calculated using an offender score of more than 9.

Osborn appeals the calculation of his offender score and his counsel's performance for not arguing that two of the crimes constituted the same criminal conduct. His SAG raises six additional grounds for review: (1) foundation and chain of custody of exhibits, (2) drug kit testimony, (3) K-9 testimony, (4) fingerprint testimony, (5) identification of Osborn as the truck's driver, and (6) cumulative error.

ANALYSIS

I. Ineffective Assistance of Counsel

A. Standard of Review

Effective assistance of counsel is guaranteed under the federal and state constitutions. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) that deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We afford great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

B. Calculation of Osborn's Offender Score

Osborn argues that his counsel was ineffective at sentencing because she did not argue that his PSP and TMVWOP convictions arose out of the same criminal conduct, resulting in an offender score calculation of 19 rather than 18.

The State responds that RCW 9.94A.585 precludes Osborn from appealing a sentence within the appropriate standard range² and that, although Osborn's counsel may have been deficient in not arguing that Osborn's PSP and TMVWOP convictions arose out of the same criminal conduct, any deficiency was harmless because Osborn's offender score was already comfortably above 9.

The State is correct that any error by Osborn's counsel was harmless. There is no tactical reason why Osborn's counsel would not have argued that his PSP and TMVWOP convictions arose out of the same criminal conduct. But the error did not prejudice Osborn because it did not affect his sentence; his offender score was well above the 9 or more threshold. He was sentenced within the standard range. And although there is at least some possibility that this miscalculation may affect a future sentence resulting from a future conviction, this possibility is far too remote and speculative to find prejudice here.

II. Statement of Additional Grounds for Review

Osborn raises six additional grounds for review. *See* RAP 10.10.

² Osborn is not appealing his sentence, but rather the miscalculation of his offender score and, more specifically, his counsel's failure to show that the offender score should have been 18 rather than 19. Thus, the State's RCW 9.94A.585 argument fails.

A. Foundation and Chain of Custody of Exhibits

Osborn argues that the trial court improperly admitted State exhibits 1, 2, 3, 6 through 11, 36, 45, 46, and 47 because the State failed to lay an adequate foundation and did not establish a sufficient chain of custody. SAG at 1-5.

We will not reverse a trial court's ruling on the admissibility of evidence absent an abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Abuse occurs when the trial court's exercise of discretion is “manifestly unreasonable or based upon untenable grounds or reasons.” *Darden*, 145 Wn.2d at 619 (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *State v. Davis*, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). Here, Osborn's trial counsel preserved his objections for appeal by objecting at trial to each of the exhibits.

The trial court overruled Osborn's foundation and chain of custody objections to exhibits 1, 2, and 3 because Shaw testified that the photographs were a fair and accurate depiction of the truck when he saw it shortly after the police recovered it. A decision to admit photographs lies within the sound discretion of the trial court. *State v. Finch*, 137 Wn.2d 792, 812, 975 P.2d 967 (1999). A photograph is sufficiently authenticated when a witness testifies that it accurately portrays the subject illustrated. *Toftoy v. Ocean Shores Props. Inc.*, 71 Wn.2d 833, 836, 431 P.2d 212 (1967). The testimony of the photographer is unnecessary. *State v. Hewett*, 86 Wn.2d 487, 492 n.4, 545 P.2d 1201 (1976). Here, as noted, Shaw testified that the photographs were a fair and accurate depiction of the truck when he saw it shortly after the police recovered it. This testimony was sufficient under Washington law to authenticate the photographs.

Similarly, the trial court overruled Osborn's foundation and chain of custody objections regarding exhibits 6 through 11 because Watts testified that (1) he collected the items from the truck and sealed them in an initialed bag before retaining them as evidence and (2) the items were in the same or substantially the same condition as when he removed them from the truck. Before physical evidence connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336 (1998). A failure to present evidence of an unbroken chain of custody does not render an exhibit inadmissible if it is properly identified as the same object and is in the same condition as it was when it was initially acquired by the party. *Picard*, 90 Wn. App. at 897. Here, Watts' testimony satisfied foundation and chain of custody requirements for exhibits 6 through 11. Watts both identified the exhibits and testified that they were in the same or substantially the same condition as when he removed them from the truck.

Osborn objected on the basis of relevance to exhibits 36, 45, 46, and 47, not foundation or chain of custody. Thus, he did not preserve his contention on appeal that the State did not lay a proper foundation or establish a sufficient chain of custody for these exhibits. An objection that does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

The trial court did not abuse its discretion in admitting exhibits 1, 2, 3, 6 through 11, 36, 45, 46, and 47.

B. Watts' Improper "Drug Kit" Testimony

Osborn argues that the trial court improperly denied his motion for a mistrial after Watts violated the trial court's pretrial order that no officer testify that he discovered a "drug kit" in the truck. Again, we disagree. SAG at 6-8.

It is appropriate for a trial court to grant a motion for mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will receive a fair trial. *State v. Greiff*, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000). We employ the abuse of discretion standard when reviewing the grant or denial of a motion for mistrial. *Greiff*, 141 Wn.2d at 921. A trial court abuses its discretion when no reasonable person would adopt its view. *Greiff*, 141 Wn.2d at 921. Thus, we will overturn a trial court's denial of a motion for mistrial only when there is a substantial likelihood that the prejudice affected the jury's verdict. *Greiff*, 141 Wn.2d at 921. In determining whether the effect of a trial irregularity affected the trial's outcome, we examine (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *Greiff*, 141 Wn.2d at 921.

Here, Watts testified that he found a "drug kit-type thing" in the truck. RP (May 25, 2005) at 140. Although the trial court expressed deep concern that the State's witness disregarded its pretrial order to not testify regarding "drug kits" and that Watts' testimony was inappropriate, it did not abuse its discretion in concluding that Watts' statement was not so prejudicial that it warranted a mistrial. The trial judge is best suited to judge the prejudice of a statement and the trial court denied the mistrial motion and admonished the jury to entirely disregard the testimony related to the "drug kit." *See Greiff*, 141 Wn.2d at 921. The evidence

was also cumulative because the items found in the alleged “drug kit” were independently admissible and admitted. Furthermore, the jury heard that methamphetamine was found on Osborn after his arrest. Given the strength of the State’s evidence in this case, it is unlikely that Watts’ testimony affected the outcome of the trial.

The trial court did not abuse its discretion.

C. K-9 Testimony

Osborn argues that Buchholz’ testimony regarding the K-9 tracking was irrelevant, prejudicial, and should have been excluded. SAG at 8-10.

A party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *Davis*, 141 Wn.2d at 850; *Silvers*, 70 Wn.2d at 432. Here, Osborn did not object to the K-9 tracking testimony and thus did not preserve this issue for appeal. But even if Osborn did preserve the issue for appeal, the K-9 tracking evidence was relevant to identifying Osborn as the truck’s driver. Bruno followed a scent down an alley away from the truck. Osborn then emerged on a bicycle near Bruno’s location. This evidence makes it more probable that Osborn was the truck’s driver than it would without the K-9 tracking evidence. *See* ER 401.

Furthermore, this evidence is not unfairly prejudicial under ER 403. Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury; it requires more than testimony which is simply adverse to the opposing party. *Gould*, 58 Wn. App. at 183. Because the trial court has considerable discretion in administering ER 403,

reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. *Gould*, 58 Wn. App. at 180. Here, it is unlikely that the K-9 testimony aroused an emotional response from the jury. Rather, it likely assisted the jury in identifying Osborn as the truck's driver. Because the testimony was adverse to Osborn does not mean that it was unfairly prejudicial.

The trial court did not abuse its discretion in admitting the K-9 evidence.

D. Fingerprint Testimony

Osborn argues that Jenkins' testimony regarding fingerprint testimony was misleading and overly prejudicial. SAG at 11-12. We disagree.

Osborn did not object to Jenkins' fingerprint evidence testimony on prints obtained from the truck and thus did not preserve the issue for appeal. A party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *Davis*, 141 Wn.2d at 849-50; *Silvers*, 70 Wn.2d at 432. But even if Osborn had objected, the evidence was not overly prejudicial because Jenkins' testimony indicated that fingerprint evidence did not assist in the identification of the truck's driver.

E. Identification of Osborn as the Truck's Driver

Osborn argues that Ferriss' identification of Osborn as the truck's driver on the night of the crime was unreliable and a violation of his due process rights. SAG at 13-18. Osborn's claim fails.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and Washington Constitutions. U.S. Const. amend VI; Wash. Const. art. I, § 22; *Darden*, 145 Wn.2d at 620. The essential purpose of confrontation of adverse witnesses is to test their

perception, memory, and credibility. *Darden*, 145 Wn.2d at 620. A defendant's opportunity to elicit matters such as the witness' bias, lack of care and attentiveness, poor eyesight, and poor memory help assure the accuracy of the fact-finding process. *Darden*, 145 Wn.2d at 620; *State v. Dukes*, 56 Wn. App. 660, 663, 784 P.2d 584 (1990). Osborn had the opportunity to confront Ferriss and cross-examine him at trial regarding his identification of Osborn as the truck's driver on the night of the crimes. The reliability of Ferriss' identification was a question for the trier of fact. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (reviewing courts must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence).

Moreover, Ferriss identified Osborn as the truck's driver shortly after he saw him during the chase. Although identification through the use of a showup is generally suspect, it is not per se unnecessarily suggestive. *State v. Kraus*, 21 Wn. App. 388, 391-92, 584 P.2d 946 (1978) (citing *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)). A showup held shortly after the crime is committed and in the course of a prompt search for the suspect is permissible. *Kraus*, 21 Wn. App. at 392.

F. Cumulative Error

Finally, Osborn argues that the cumulative effect of all errors he alleges resulted in an unfair trial. SAG at 18-19. The cumulative error doctrine applies when several errors occurred at the trial but none alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003). A defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). But absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair

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trial. *Saunders*, 120 Wn. App. at 826. Here, there was no prejudicial error that deprived Osborn of a fair trial; thus, the cumulative error doctrine does not apply.

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We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, A.C.J.

We concur:

Armstrong, J.

Hunt, J.